

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAXNET HOLDINGS, INC. : CIVIL ACTION
 :
 v. :
 :
 MAXNET, INC. : NO. 98-3921

MEMORANDUM AND ORDER

HUTTON, J.

December 7, 1998

Presently before this Court is Plaintiff Maxnet Holdings, Inc.'s unopposed Motion for Default Judgment Against Defendant Maxnet, Inc. (Docket No. 4). For the reasons stated below, the Plaintiff's Motion is **DENIED with leave to renew**.

I. BACKGROUND

Maxnet Holdings, Inc. ("Maxnet Holdings" or "Plaintiff") in the instant matter requests that the Court enter a default judgment against the Defendant, Maxnet, Inc., for permanent injunctive relief and for damages arising from the Defendant's use of the Maxnet trademark.

Maxnet is a registered trademark ® of Maxnet Systems, Inc. ("Maxnet Systems"). Maxnet Systems is a privately held operating company of Maxnet Holdings and is the outcome of H.I.G. Capital Management's acquisition of Maxnet Communication Systems, Inc. in 1998. Maxnet Systems is an enterprise network engineering company that supports mission-critical building and campus

networks, wide area networks (WANs), and metropolitan area networks (MANs). The corporate headquarters of Maxnet Holdings and Maxnet Systems is located in South Florida.

Maxnet, Inc. is a Pennsylvania corporation having a business in Huntingdon Valley, Pennsylvania, and is a publicly traded corporation (NASDAQ-BB "MXNT"). Maxnet, Inc. is an Internet marketing company with products such as Internet online directories.

On July 28, 1998, the Plaintiff filed its Complaint charging the Defendant with violating 15 U.S.C. §§ 1114 and 1125(a), (c) (1994) of the Lanham Trademark Act. The Plaintiff asserts that the Defendant was served on September 2, 1998, but has "failed to file an appearance, an answer or otherwise respond to Plaintiff's Complaint" as prescribed by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 55(a). Consequently, the Plaintiff filed the instant motion moving this Court to enter a default judgment in favor of Plaintiff and against Defendant. On November 18, 1998, the Plaintiff served the Defendant with the instant motion, however, as of the date of this memorandum, the Defendant has not yet responded to the Plaintiff's motion. A damages hearing is scheduled for December 18, 1998.

II. DISCUSSION

A. Granting a Default Judgment

The entry of default and default judgment is governed by Federal Rule of Civil Procedure 55, which reads in pertinent part:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor

Fed. R. Civ. P. 55(a)-(b). Generally, the entry of default and default judgment is disfavored because it prevents a plaintiff's claims from being decided on the merits. Thompson v. Mattleman, Greenberg, Shmerelson, Weinroth & Miller, No.CIV.A.93-2290, 1995 WL 321898, *3 (E.D. Pa. May 26, 1995); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2681 (1983).

The court is required to exercise "sound judicial discretion" in deciding whether to enter default judgment. "This element of discretion makes it clear that the party making the

request is not entitled to a default judgment as of right, even when the defendant is technically in default." 10 Wright, Miller & Kane, Federal Practice and Procedure § 2685. The court should consider a number of factors in determining whether to enter default and default judgment, including:

the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; and whether plaintiff has been substantially prejudiced by the delay involved. Furthermore, the court may consider whether the default was caused by a good faith mistake or excusable neglect; how harsh an effect a default judgment might have; and whether the court thinks it later would be obliged to set aside the default on defendant's motion.

Franklin v. National Maritime Union of America, No.CIV.A.91-480, 1991 WL 131182, *1 (D. N.J. Jul. 16, 1991), aff'd, 972 F.2d 1331 (3d Cir. 1992) (TABLE), cert. denied, 507 U.S. 926 (1993) (citing 10 Wright, Miller & Kane, Federal Practice and Procedure § 2685 (1983)).

The Third Circuit has condensed those factors into a list of three: (1) prejudice to the plaintiff if default judgment is not granted; (2) whether the defendant has a meritorious defense; and (3) whether the defendant's delay was the result of culpable misconduct. Harad v. Aetna Cas. and Sur. Co., 839 F.2d 979, 982 (3d Cir. 1988); De Bueno v. Bueno Castro, 822 F.2d 416, 149-20 (3d Cir. 1987); Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3d Cir. 1984); United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984); Feliciano v. Reliant Tooling Co., Ltd., 691

F.2d 653, 656 (3d Cir. 1982); Estate of Menna v. St. Agnes Med. Ctr., No.CIV.A.94-2424, 1994 WL 504442, at *1 (E.D. Pa. Sept. 14, 1994) (citing Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984)). A standard of "liberality" rather than "strictness" should be used so that "any doubt should be resolved [against default] judgment so that cases may be decided on their merits." Medunic v. Lederer, 533 F.2d 891, 893-94 (3d Cir. 1976)(quoting Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245-46 (3d Cir. 1951)).

1. Prejudice to the Plaintiff by Denying the Default Judgment

The first question is whether denying the Plaintiff's motion for default judgment would prejudice the Plaintiff. Factors which can be considered in determining the existence of prejudice include: (1) loss of available evidence; (2) increased potential for fraud; and (3) substantial reliance on the judgment. Feliciano, 691 F.2d at 657. "Delay in realizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to [grant] a default judgment." Id. at 656-57.

In the instant matter, the Plaintiff will suffer prejudice absent a default judgment. Both the business of the Plaintiff and Defendant are in the computer industry. By operating as Maxnet, Inc., an impression exists that there is some relation between it and the Plaintiff. As a result, goods and services of

the Defendant may be incorrectly identified as those of the Plaintiff. Furthermore, the Plaintiff alleges that the Defendant is in competition with the Plaintiff.

2. Will the Defendant Have Meritorious Defenses?

Next, the Court must determine whether the defendant will have meritorious defenses. "A claim or defense will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 869-70 (3d Cir. 1984); accord \$55,518.05 in U.S. Currency, 728 F.2d at 195; Feliciano, 728 F.2d at 657; Farnese v. Bagnasco, 687 F.2d at 764. It is sufficient that the proffered defense is not "facially unmeritorious." Emcasco Insurance Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 123 (3d Cir. 1983).

In the instant matter, the Defendant does not have a meritorious defense. Maxnet is a registered trademark® of Maxnet Systems. Maxnet Systems is a privately held operating company of Maxnet Holdings.

3. Was Defendant's Conduct Culpable?

Finally, the Court must examine whether the defendant's conduct was culpable. Culpable conduct is dilatory behavior that

is willful or in bad faith. Gross, 700 F.2d at 123-24; Feliciano, 691 F.2d at 657.

On October 1, 1997, the Defendant issued a press release in which it indicated that "Maxnet [,Inc.] has agreed to change its name and will immediately notify the public, its clients, and shareholders when a decision is made." Almost a year has gone by since that statement and no decision by Maxnet, Inc. has been made. Given the press release, the Defendant's conduct appears culpable. Moreover, Maxnet, Inc.'s failure to answer the complaint and to oppose Maxnet Holdings's motion for default judgment is culpable conduct.

B. Granting Injunctive Relief

In the form of order accompanying the instant motion, the Plaintiff moves this Court to issue a permanent injunction against the "Defendant, its officers, agents, servants, employees, attorneys, parents, and subsidiaries, and related companies, and all persons acting for, with, by, through or under them." The Plaintiff does so, without ever filing a memorandum of law supporting its motion for a permanent injunction.

To be entitled to an injunction, the moving party must satisfy to the court that relief is needed. United States v. Borden Co., 347 U.S. 514, 519 (1954). The standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must show actual success on

the merits rather than a likelihood of success. See, e.g., Univ. of Texas v. Camenisch, 451 U.S. 390, 392 (1981). A permanent injunction is ordinarily issued only after a full trial on the merits. Schwartz v. Cohen, No. CIV.A.95-7851, 1996 WL 591206, at *3 (S.D. N.Y. Oct. 15, 1996). The moving party must show that an injunction from a federal court is the only adequate remedy and that there is no adequate remedy at law. See Thornock v. Kinderhill Corp., 702 F. Supp. 468, 471 (S.D. N.Y. 1988).

To obtain a preliminary injunction, the Plaintiff must show (1) irreparable injury, (2) a reasonable probability of success on the merits, (3) the harm to it outweighs the possible harm to other interested parties, and (4) harm to the public. Pappan Enters., Inc. v. Hardee's Food Systems, Inc., 143 F.3d 800, 803 (3d Cir. 1998). Moreover, the issuance of a preliminary injunction is governed by Rule 65 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 65. Plaintiff's instant motion does not address any of these concerns.

C. Conclusion

Because this Court has not had the opportunity to access the merits of the Complaint and the Plaintiff has not satisfied the requirements set forth in Pappan and Rule 65, the Plaintiff's motion for default judgment is denied with leave to renew.

An appropriate Order follows.

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O R D E R

AND NOW, this 7th day of December, 1998, upon consideration of Plaintiff Maxnet Holdings, Inc.'s unopposed Motion for Default Judgment Against Defendant Maxnet, Inc. (Docket No. 4), IT IS HEREBY ORDERED that the Plaintiff's Motion is **DENIED with leave to renew.**

BY THE COURT:

HERBERT J. HUTTON, J.